[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

On Writ of Certiorari to the Supreme Court of Georgia.

BRIEF FOR RESPONDENTS.

FRANK E. JONES,
TIMOTHY K. ADAMS,
CHARLES H. COOK,
500 First National Bank Building,
Macon, Georgia 31201,
Attorneys for Respondents, Trustees Under the Last Will and Testament of Augustus Octavius Bacon.

St. Louis Law Printing Co., Inc., 415-421 N. Eighth St., 63101 — Garfield 1-0104

INDEX.

	Page
Question Presented	1
Statement of the Case	2
The Will	4
The 1920 Deed	8
City Activity	9
Summary of Argument	12
Argument	16
I. Introductory: State and National Law	16
II. The Decision of the Court Below Is Not Hostile to the Petitioners' Right to Immunity From Racial Discrimination	18
A. The Decision of the Georgia Supreme Court Did Not Infringe Upon Any Rights Guaranteed Petitioners by the Fourteenth Amendment; Nor Does It Encourage Racial Discrimination. The Decision Involved Nothing More Than the Construction of a Georgia Will by a Georgia Court in Accordance With Georgia Law	18
B. The Decision of the Georgia Court Rests Solely Upon a Construction of Bacon's Will, and in No Way Rests Upon Any Proposition That the Presence of Negroes Would Affect the Enjoyment of a Park by White Persons	30

C. The Racial Restrictions in Bacon's Will Could Not, Under Any Theory, or for Any Reason, Have Been Treated by the Georgia Court, or any Other Court, as "Nullities". The Georgia Court, in Construing Bacon's Will, Had to Consider These Provisions Along With All Other Provisions of the Will 37

Conclusion 49

TABLE OF CITATIONS.

Cases.

Bennett v. Davis, 201 Ga. 58, 39 S. E. 2d 3 (1946) .. 30
Brown v. City of East Point, 148 Ga. 85, 95 S. E. 962 (1918) 48
Brown v. Gunn, 75 Ga. 441 (1885) 39
Burbank v. Burbank, 152 Mass. 254, 25 N. E. 427 (1890) 38
Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961) 40, 41

Charlotte Park and Recreation Commission v. Barringer, 252 N. C. 311, 88 S. E. 2d 114 (1955), cert. denied 350 U. S. 983 (1956) 21, 29
Commonwealth of Pennsylvania v. Brown, 392 F. 2d 120 (3rd Cir. 1968), cert. den. 391 U. S. 921 (1968) 47

DeCosta v. DePas, Amb. 228, 2 Swanst. 487 (1754)..33, 34

Evans v. Newton, 382 U. S. 296 (1966) 12, 14, 16, 19, 20, 21, 44, 48
Evans v. Newton, 220 Ga. 280, 138 S. E. 2d 573 (1964), reversed, 382 U. S. 296 (1966) on remand, 221 Ga. 870, 148 S. E. 2d 329 (1966) 38, 45
Evans v. Newton, 221 Ga. 870, 148 S. E. 2d 329 (1966) 18

First Universalist Society of Bath v. Swett, 90 A. 2d 812 (Me. 1953) 32

Jones v. Habersham, 107 U. S. 174 33

LaFond v. City of Detroit, 357 Mich. 362, 98 N. W. 2d 530 (1959) 34
Lyeth v. Hoey, 305 U. S. 180 (1938) 16, 20

Marsh v. Alabama, 326 U. S. 501 (1946) 46, 47

New York Times v. Sullivan, 376 U. S. 254 (1964) .. 17

Peterson v. City of Greenville, 373 U. S. 244 (1963)..41, 42
Plessy v. Ferguson, 163 U. S. 537 (1896) 44
Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 89 S. Ct. 601 (1969) 17, 22

Reitman v. Mulkey, 387 U. S. 369 (1967) 23, 42

Smith v. DuBose, 78 Ga. 413 (1887) 44
Strother v. Kennedy, 218 Ga. 180, 127 S. E. 2d 19 (1962) 38
Sweet Briar Institute v. Button, 280 F. Supp. 312 (W. D. Va. 1967), rev'd per curiam, 387 U. S. 423, decision on the merits, 280 F. Supp. 312 (1967) .. 47

Yerby v. Chandler, 194 Ga. 263 (1942) 21, 27

Statutes.

Georgia Code, Section 69-504 .....38, 39, 41, 42, 43, 44
Georgia Code, Section 69-505 42
Georgia Code, Section 108-106 (4) 26, 44

Other Authorities.

15 Am. Jur. 2d, Charities, Section 6 38
23 Am. Jur. 2d, Dedication, Section 68 48
39 Am. Jur., Parks, Squares and Playgrounds, Section 21 .....30, 48
Restatement, Trusts, Section 379 (1959) 38
IV Scott, Trusts (2d ed. 1956) 27, 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No. 1106.

REVEREND E. S. EVANS, et al.,
Petitioners,

v.

GUYTON G. ABNEY, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia.

BRIEF FOR RESPONDENTS.

QUESTION PRESENTED

Where a testator devises land in trust with the direction that said land be used as a park for the white persons,[1] and

[1] The property was devised in trust "for the sole . . . use of the white women, white girls, white boys, and white children of the City of Macon . . ." The Board of Managers in which management of the park was vested was given the authority to admit "the white men of the City of Macon and white persons of other communities."

only for tne white persons, of the community, and states as the reason for the racial limitation his positive disapproval of the two races using recreation grounds together and in common, and where it is subsequently held by the United States Supreme Court that the property cannot continue to be used as a park for white persons only, are Negro citizens of the community denied any Federal constitutional rights by a judgment of a state court recognizing that (as a matter of state law and of the interpretation of the particular bill under consideration) the trust has failed, and the property has reverted to the heirs of the testator?

STATEMENT OF THE CASE.

Respondents incorporate by reference the statement of the case contained in the opinion of the Supreme Court of Georgia (A. 537). Generally speaking, and except as hereinafter commented upon, petitioners have made a relatively accurate summary of most of the evidence which is in the record. However, as far as the issues are concerned, we view the great bulk of material in the record as being largely, if not entirely, irrelevant. This is so because the disposition of this case in the Georgia courts was controlled by the clear and unambiguous terms of the will of A. O. Bacon interpreted in the light of well-settled principles of Georgia law.

Petitioners state at page 5 of their brief that the Baconsfield property was "left to the City of Macon." Since petitioners have, throughout this litigation, tended to overemphasize and exaggerate the role of the City, it should be noted that the property was not devised to the City of Macon outright, but instead the City's interest in the property was as the passive title holder, and the use of the property was subject to certain specific conditions (as well as the continuing control of the Board of Managers).

Petitioners are in error when they state on page 7 that the motion of respondents in Bibb Superior Court asked that court to "rule that Senator Bacon's trust had become unenforceable, and that the Baconsfield property had reverted . . ." That the trust had become unenforceable had already been recognized by the Georgia Supreme Court and respondents' motion for summary judgment took note of this:

> "On January 17, 1966, Bacon's trust became unenforceable and the funds held for its support reverted

at that time into Bacon's estate by operation of law. On March 14, 1966, the Georgia Supreme Court recognized that this had occurred saying, 'We are of the opinion that the sole purpose for which this trust was created has been terminated.' This judgment declaring what had transpired in regard to the title is now the law of the case. It remains only for this court at this time to give effect to said reversion of title." Respondents' Motion for Summary Judgment, paragraph 2 (A. 98).

The "secondary contentions" which the Georgia Supreme Court directed Bibb Superior Court to consider, were those contentions resulting from the decision that the Baconsfield property could not be used in accordance with the provisions of Bacon's will, that the trust had failed and the property had reverted into Bacon's estate. The Georgia Supreme Court having ruled that the trust had failed and the property had reverted, the only real question before Bibb Superior Court involved a determination as to the individuals in whom title had vested by operation of law.

The Will.

In view of the fundamental importance of Bacon's will, those passages from Items IX and X which are controlling are quoted herewith:

". . . it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions of every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their succesors forever, in trust for **the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white**

children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for; the said property **under no circumstances**, or by any authority whatsoever, to be sold or alienated or disposed of, **or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized.** For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as at first constituted, but at all times thereafter. **The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person or persons of either sex, who may be deemed objectionable,** or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board

their presence in said grounds inconsistent with or prejudicial to proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the power to admit to the use of the property white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement, and preservation of said property, including when possible drives and walks, casinos and parlors for women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements, I direct that said Board may use for purposes of income in any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield (more particular description of property omitted), but in no event and under no circumstances shall any part of the property herein conveyed and bounded and platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified . . ."

". . . **I take occasion to say that in limiting the use and enjoyment of the property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people.** On the contrary I have for them the kindest feeling, and for many of them esteem and

regard, while for some of them I have sincere personal affection.

"I AM HOWEVER, WITHOUT HESITATION IN THE OPINION THAT IN THEIR SOCIAL RELATONS THE TWO RACES SHOULD BE FOREVER SEPARATE AND THAT THEY SHOULD NOT HAVE PLEASURE OR RECREATION GROUNDS TO BE USED OR ENJOYED, TOGETHER AND IN COMMON. I am moved to make this bequest of said property for the use, benefit and enjoyment of the white persons herein specified by my gratitude to and love for the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December, 1884, and Augustus Octavius Bacon, Jr., who died on the 27th day of the same year. **And I conjure all of my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated. . . .**"

". . . If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the Charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed by conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their Charter to hold in trust for the

purposes specified the property designated for said park and pleasure ground, unless said required power is conferred by appropriate legislation . . .''

''. . . As there will be no one of my descendants who now bears my name either by right of birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, **I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community** of which they once formed a happy part . . .'' (A. 19-25). (Emphasis supplied.)

The 1920 Deed.

The statement on page 13 that ''the City of Macon thus paid a total of $41,625.00 to the trustees under Bacon's will in order to acquire Baconsfield'' is inaccurate. The City of Macon's limited interest in the Baconsfield property was acquired by virtue of the provisions of Bacon's will, and not because of the 1920 deed. Under the terms of Bacon's will, the park was not to come into being until the deaths of Bacon's wife and two children. However, the trustees and Bacon's sole surviving daughter were apparently of the opinion that it would be desirable to proceed with an earlier development of Baconsfield than anticipated by Bacon's will. Therefore, the trustees advised the City of Macon that they would permit the City to take possession of Baconsfield prior to the death of Bacon's surviving daughter provided the City would agree to pay an annual rental during her lifetime (A. 406). Thus the sole purpose of the deed of February 4, 1920 was to permit the development of Baconsfield as a park prior to the death of Bacon's surviving daughter (who had a beneficial life estate in the property).

City Activity.

On page 14, petitioners state that the Superintendent of Parks of the City of Macon "exercised general supervision over Baconsfield for many years." This is not true. Baconsfield was "supervised" and operated by the Board of Managers which Bacon provided for in his will:

> "The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same . . ." (A. 19).

The Board of Managers of Baconsfield functioned entirely independent of the City and it always exercised to the fullest those powers granted under Bacon's will. In none of its duties was the Board made answerable to the City; nor did the City, as Trustee, have the right to remove any member of the Board.

That the Board, and not the City, operated the park is evidenced by the minutes of the Board of Managers from 1936 to 1964. (See Intervenors' Exhibits "A" and "B", A. 246 et seq.) These minutes which take up approximately 150 pages and summarize action taken at some 53 separate meetings during the period covered show that the Board of Managers dealt with the minutest details of the operation of the park. Furthermore, the Board spent substantial sums of money in connection with the operation of the park, this money having been derived from rental property located in the commercial area of Bacon's property (and not from public revenues). According to financial statements attached to the minutes of the Board, the Board spent approximately $95,000.00 in connection with the operation of the Park. This money was used to purchase such things as fertilizer, flowers, shrubbery and equipment. (See, e. g., Treasurer's State-

ment, A. 284, and Treasurer's Statement, A. 300.) In addition, the Board used its funds for various capital expenditures (e. g., fill work, paving, sprinkler system) (A. 136).

The Board also compensated Mr. T. Cleveland James for his services in the maintenance and upkeep of Baconsfield. Initially he was furnished a home, and when he vacated the house in 1947 the Board voted to pay Mr. James $50.00 per month for six months with the right to "renew same for similar periods" (A. 290). The Board also made other payments to Mr. James from time to time. (See, e. g., A. 317, 326 and 343.)

Petitioners seem to try to create the impression that governmental units have constructed numerous physical improvements on the park area. That this is not so is illustrated by the aerial photographs included in the record (A. 362-374). From these it may be seen that Baconsfield is largely a matter of trees, shrubbery and grass, with only one real structure upon it, to-wit, the Woman's Clubhouse (which itself comprises a very small portion of the park area).

Petitioners have also greatly overemphasized the role of the City in the development of Basconsfield, especially when they attempt to convey the idea that City funds have been used to greatly enhance the value of the property. The activities of the City in assisting in the upkeep of the park, while beneficial, did little to increase the intrinsic value of the land. Also, it should be remembered that during this period of time a substantial number of taxpayers were entitled to use the park.

The pool which was constructed in 1948 in the commercial area was operated by the City pursuant to the terms of a lease agreement with the Board of Managers as lessor. Under the terms of the agreement, the Board

could terminate the lease at will at two-year intervals, or by giving notice of a breach of any one of a number of stated conditions (See copy of lease attached to Amendment to Motion for Summary Judgment as Exhibit "D", A. 384). The relationship between the City of Macon and the Board of Managers was that of lessor and lessee. A fundamental element of such a relationship is that when the lease expires, or is terminated, any improvements that might have been made to the land will remain as a part of the land, and the lessee has no further rights or interest in either the land or the improvements.

We would point out as a matter of information that the swimming pool has not been open since 1964 and the photographs in the record (A. 494-500) show that the pool is no longer in serviceable condition.

We see no particular need to comment further on the statement of facts, except, perhaps to note once again that petitioners' "history" of Baconsfield Park had no bearing on the issues before the Georgia court.

SUMMARY OF ARGUMENT.

The decision of the Georgia Supreme Court involved nothing more than the construction of a Georgia will in accordance with well-settled principles of Georgia law, and no rights guaranteed petitioners by the Fourteenth Amendment, or any other provision of the Constitution, have been denied.

When A. O. Bacon devised his farm, "Baconsfield", to the City of Macon, in trust, he clearly provided that his property was to be used as a park **only** for the "white women . . . and white children of the City of Macon. . . ."[2] In limiting the use of the property to white persons, Bacon was not motivated by any feeling of hostility toward colored persons, nor was he necessarily prompted by a desire to be charitable only to persons of his own race. Instead, it was that as a matter of personal social philosophy Bacon was of the firm conviction that, "the two races should be forever separate and, . . . should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

Some fifty years after the probate of Bacon's will, this Court, in **Evans v. Newton**, 382 U. S. 296 (1966), ruled that Bacon's property could no longer continue to be used as a park for white persons only. Upon remand of the case to the Georgia Supreme Court, it then became the duty of that court to consider, and construe, Bacon's will in the light of the decision of this Court.

The Georgia court had before it two basic "facts", *viz.:* (1) Bacon's clear expression of intention that he wanted his property used as a park only for white persons, and that he was opposed to his property being used as a park on an integrated basis and, (2) this Court's

[2] See Footnote 1.

ruling that the property could not continue to be used as a park if it were not operated on an integrated basis. The purpose for which the trust had been established (to wit, a park for the **sole** use of the "white women . . . and white children of the City of Macon . . .") had obviously become impossible of further enforcement. Furthermore, that the use of Bacon's property for in antegrated park would be directly contrary to Bacon's clearly expressed intention was a **fact** which the Georgia court had to accept. And it was a fact totally apart from the wisdom, or present acceptability, of Bacon's social philosophy; for the Georgia court was constrained to consider, not what it might want, but rather only what Bacon specifically said he wanted. Under Georgia law, everywhere accepted in the United States, property devised in trust for a charitable use cannot be diverted from that use to one not intended or authorized by the testator, and *a fortiori,* it cannot be devoted to a use of which the testator has expressly stated he disapproves. Thus, as a matter of basic Georgia law, the court had to recognize that the purpose for which the trust had been established had become impossible of accomplishment, that the trust had failed, and that the property had reverted into Bacon's estate by operation of law.

In construing Bacon's will, it was incumbent upon the Georgia court to construe the will as a whole, and to consider all parts and provisions thereof, including those provisions which limited the use of Bacon's property to white persons. Contrary to the contention of petitioners, under no theory could the court have considered any provision of the will as being a "nullity". If a charitable trust fails because an indispensable provision of the trust is deemed to be unenforceable, the result is not an ipso facto elimination of that provision from the will, but instead it then becomes the duty of the court to decide whether under the circumstances then existing *cy pres*

can, or cannot, be applied. Under no circumstances can the testator's intention simply be disregarded or ignored.

The Georgia court was correct in not applying *cy pres*, for this is an intent-enforcing doctrine and it can be applied only for the purpose of carrying out what probably would have been in accordance with the intention of the testator. It can never be applied where the result would be contrary to the express desire of the testator, and it cannot be denied that for Bacon's property to be used as a park open to both races would be directly contrary to his wishes, as stated in the will.

Contrary to the contention of petitioners, the Georgia court was not concerned with whether Negroes might spoil the use of the park for white persons, or whether, as a matter of fact white persons would "enjoy" using the property as a park on an integrated basis. The court's only concern was whether such use would violate Bacon's restriction that the property be used by white persons only, and clearly it would.

No federal rights have been denied petitioners, as the "federal interest" of petitioners is no more than that if Baconsfield were continued in existence as a park, it would have to be operated on a non-discriminatory basis. This the Georgia Court recognized and accepted. There was no Federal requirement that the Georgia court construe Bacon's will in such a manner that would result in Baconsfield continuing as a park, when such construction would not be authorized by the will, and would be contrary to the laws of Georgia.

Any possible question of racial discrimination, or of impermissible state action, was eliminated by this Court's decision in **Evans v. Newton**, supra, for with the failure of the trust, and the reversion of the property into the estate of A. O. Bacon, the property has been removed

from the "public" sphere. In the decision under consideration, there is no question of anyone being discriminated against because of race, nor is it conceivable that the decision could be considered as one which would encourage racial discrimination. On the contrary, the Georgia courts expressly recognized that Bacon's property cannot be used as a park on a racially discriminatory basis.

In summary, it is the position of respondents that this case involves the construction of a Georgia will by a Georgia court in accordance with Georgia law, and nothing else, and in no way have any rights guaranteed petitioners by the Federal Constitution been denied.

ARGUMENT.

I.

Introductory: State and National Law.

In response to petitioners' introductory statement, we reaffirm—and reassert—our firm conviction that the decision of the Supreme Court of Georgia involved nothing more than the application of well-settled principles of Georgia law to a Georgia will. Furthermore, no rights guaranteed petitioners by the Fourteenth Amendment, or by any other provision of the U. S. Constitution, have been denied; nor is the decision of the Georgia court in any way inconsistent with the decision of this Court in **Evans v. Newton**, 382 U. S. 296 (1966).

As petitioners concede that Georgia courts have the power to "say when, under Georgia law, a trust has terminated"[3] (Petitioners' brief, p. 38), we would acknowledge that Georgia cannot have laws which do not measure up to the requirements of the Constitution; nor can Georgia courts deny persons before them constitutionally guaranteed rights. Thus, unless the Georgia law which governed the disposition of the case in the state court itself violates the Fourteenth Amendment, or the Georgia court actually denied petitioners rights guaranteed them by the Federal Constitution, the decision of the Georgia Supreme Court must be affirmed.

The two fairly recent decisions of this Court which petitioners cite in support of their contentions relative to the supremacy of the Constitution have no relevance to

---

[3] It is well-settled that the construction of wills is the responsibility of state courts. As this court stated in **Lyeth v. Hoey**, 305 U. S. 180, 59 S. Ct. 155 (1938): "The local law determines the right to make a testamentary disposition . . . and the condition essential to the validity of wills, and **the state courts settle their construction.**" 59 S. Ct. at 158. (Emphasis supplied.)

the issues in this case except perhaps insofar as they are useful in illustrating why no federal question is present.

In **Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church**, 89 S. Ct. 601 (1969), the action of the Georgia court had been governed by the principle of Georgia law which "implies a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches." Id. at 603. This meant that Georgia law required the state court to make its own interpretation of church doctrines and to determine "matters at the very core of a religion." Id. at 607. This, the U. S. Supreme Court ruled, was action which is proscribed by the First Amendment.

Likewise, in **New York Times v. Sullivan**, 376 U. S. 254 (1964), this court had to consider a principle of state law which had been applied by the Alabama court. It was concluded that the Alabama rule of law which had been applied did not measure up to constitutional requirements as it failed to provide safeguards for freedom of speech and of the press which are required by the First and Fourteenth Amendments.

Thus, in both **Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church**, supra, and **New York Times v. Sullivan**, supra, the Court had before it cases which involved the application of state laws which did not meet the requirements of the U. S. Constitution. In the case at bar, we do not understand petitioners' contentions as including an attack on the Georgia law which was applied in the state court. And, of course, there would be no ground for such an attack as the state law which was applied is neither unusual or discriminatory. The law is simply that when the purpose for which a trust was created becomes im-

possible of accomplishment, the trust fails and the corpus reverts to the testator's estate by operation of law. See **Evans v. Newton,** 221 Ga. 870, 871. This principle of property law (which is by no means peculiar to Georgia) has absolutely nothing whatever to do with segregation or integration, nor does it in any conceivable way violate the Fourteenth Amendment.

Secondly, the decision of the state court in no way denied to petitioners any rights guaranteed them by the United States Constitution, for the "right" to use Baconsfield was subject to the property continuing to be used as a park. In this regard, petitioners possessed exactly the same rights as did all other persons in the community. But neither petitioners, nor anyone else, had any right to require the property to continue to be used as a park, when such use would violate Bacon's prohibition against the property being used as a park on an integrated basis.

In summary, the law which was applied by the Georgia court was clearly not unconstitutional, and no rights guaranteed petitioners by the Federal Constitution have been denied. Therefore, the decision of the Georgia Supreme Court should be affirmed.

II.

The Decision of the Court Below Is Not Hostile to the Petitioners' Right to Immunity From Racial Discrimination.

A. The Decision of the Georgia Supreme Court Did Not Infringe Upon Any Rights Guaranteed Petitioners by the Fourteenth Amendment; Nor Does It Encourage Racial Discrimination. The Decision Involved Nothing More Than the Construction of a Georgia Will by a Georgia Court in Accordance With Georgia Law.

The "immediate contemporary facts" with which petitioners choose to begin their Fourteenth Amendment argu-

ment are not the "facts" with which the Georgia court was directly concerned. On the contrary, the Georgia court had only two basic "facts" to consider, one being this Court's decision in **Evans v. Newton**, 382 U. S. 296 (1966), and the other, of course, being Bacon's will. The fact that Negroes had used the park in violation of the terms of the trust, and that the City had not taken affirmative action to enforce the racial provisions in the trust, had nothing directly to do with the decision of the Georgia court which is herein complained of. These were matters which had transpired prior to and were encompassed in this Court's decision in **Evans v. Newton**, supra. The "showing", then, upon which the Georgia court acted was this Court's ruling that Bacon's property could not be used as a park on other than an integrated basis, something which would be contrary to Bacon's express wishes; and the basis of the Georgia decision was a construction of Bacon's will in the light of this ruling, and in the framework of Georgia's laws relative to wills and trusts.

The problem with petitioners' argument is that they completely ignore the distinction which must be made between the federal question of the manner in which the park would have to be operated if it continued in existence as a park, and the state law question involving the construction of the will (in the light of the ruling of this court that the property could not be used in conformity with the racial conditions set forth in the will). We submit that the "federal interest" of petitioners is no more than that if Baconsfield were continued in existence as a park, it would have to be operated on a nondiscriminatory basis. This, of course, the Georgia court recognized and accepted. There is no basis for the implication that there was an additional federal requirement that the Georgia court construe Bacon's will in such a manner that would result in Baconsfield continuing as a park, when such construction would not be authorized

by Bacon's will, and would be contrary to his expressed intention and the laws of Georgia. The determination of the effect of carrying out the provisions of Bacon's will was peculiarly a matter which addressed itself to the state court. See, e. g., **Lyeth v. Hoey**, 305 U. S. 180, 59 S. Ct. 155 (1938). And as Mr. Justice Black observed in his dissenting opinion in **Evans v. Newton**:

> "So far as I have been able to find, the power of a state to decide such a question (reversion) has been taken for granted in every prior opinion this Court has ever written touching the subject." **Evans v. Newton**, 382 U. S. 296 (1966).

Petitioners' characterization of the Georgia judgment as being a "penalty" (or a "sanction") which was imposed upon the City of Macon because of its inability to enforce racial segregation at Baconsfield does not comport with the facts and constitutes a gross inaccuracy. A fair and objective reading of the opinion of the state court could lead no one to the conclusion that the Georgia court "imposed" trust failure (and reversion) because its members did not want an integrated park, or because the court wanted to punish the City of Macon. It is obvious, we think, that petitioners are attempting to fabricate impermissible state action where none exists. In so doing, they paint a totally false picture; one which is clearly refuted by the record. Reversion occurred **only** because the trust failed, and the trust did not fail because the City did not undertake to enforce the racial restriction, but, rather, it failed because this Court had ruled that an indispensable element of Bacon's plan for Baconsfield could not be complied with. The Georgia Supreme Court did not look to the will to "justify" its judgment. It looked to the will to determine what its judgment had to be.

Accurately speaking, the actual decision of the Georgia court had nothing whatever to do with racial discrimina-

tion as such. This issue had been completely eliminated by the decision in **Evans v. Newton,** 382 U. S. 296 (1966). The decision of the Georgia court was based upon a set of **facts** which can, and must, be divorced from any consideration of the merits of Bacon's social philosophy. The Georgia court had to start with the fundamental proposition that in construing Bacon's will all parts and provisions of the will had to be considered. See **Yerby v. Chandler,** 194 Ga. 263, 21 S. E. 2d 636 (1942). The wisdom of these provisions was not in issue. Thus, the Georgia court had before it on the one hand Bacon's clear expression of intention that he wanted a park **only** for "white women, white children . . .", and that he was unequivocally opposed to the two races using recreation grounds "together and in common". On the other hand, this court had ruled that Bacon's property could not be used as a park unless it was open to members of both races. Certainly, it cannot be denied that for the property to be used as a park open to members of both races would be directly contrary to the clearly expressed intention of Bacon. That was a fact which the Georgia court had to accept. As a matter of Georgia law, property devised in trust for a charitable use cannot be diverted from that use to one not intended or authorized by the testator, and *a fortiori,* it cannot be devoted (or subjected) to a use of which the testator has expressly stated he disapproves. Therefore, accepting the foregoing as facts which the Georgia court could not blithely ignore (even if perhaps the members of the court might personally have disagreed with Bacon's social philosophy), the court had no alternative but to recognize that as a matter of Georgia law the trust had failed.[4] We say, without hesi-

[4] For the Georgia Court to have failed to recognize that the trust had failed would have resulted in a deprivation of respondents' property without due process of law. See **Charlotte Park & Recreation Commission v. Barringer,** 252 N. C. 311, 88 S. E. 2d 114 (1955), cert. denied, 350 U. S. 983 (1956).

tation, that the philosophy of the individual justices as to segregation by race had nothing to do with the decision of the Georgia court.

We disagree with the assertion that the Georgia decision will be cited for "the proposition that state courts may generally decree reversion of property for breach of a racial condition." Petitioners overlook the fact that this case does not involve property which had been purchased subject to a racial condition. This was Bacon's property, and it is fundamental that a person who creates a charitable trust can make the use of his property subject to conditions.[5] That is not to say that a testator could require that his property be used in a manner contrary to law, but it does mean that under no circumstances could the property be used in a manner violative of the express conditions imposed upon the use of the property by the testator. It is one thing for a court to say, in effect, that as a matter of public policy it is not going to let a testator's property be used in the manner he would like it to be, and, indeed, quite another to go further and say that since the property cannot be used in the prescribed manner it will be put to another use even though the testator specifically stated that he disapproved of such use.

Contrary to the contention of petitioners (Petitioners' brief, p. 41) the decision of the Georgia court is not at

[5] As Mr. Justice Harlan noted in his concurring opinion in **Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church**: "I do not, however, read the Court's opinion to go further to hold that the Fourteenth Amendment forbids civilian courts from enforcing a deed or will which expressly and clearly lays down conditions limiting a religious organization's use of the property which is granted. If, for example, the donor expressly gives his Church some money on the condition that the Church never ordain a woman as a minister or elder . . . or never amend certain specified articles of the Confession of Faith, he is entitled to the money back if the condition is not fulfilled." 89 S. Ct. 601, 607 (1969).

all inconsonant with **Reitman v. Mulkey**, 387 U. S. 369 (1967) (or with any other decision of this court). In **Reitman**, supra, it was found that the state had involved itself in private racial discrimination to an unconstitutional degree. The court was concerned with state involvement in actual racial discrimination, both present and prospective. In the decision under consideration, there is no question of anyone being discriminated against because of race; and, certainly, there is nothing which would remotely suggest that the state has encouraged, or been in any way involved with constitutionally impermissible racial discrimination. It was Bacon, not the State of Georgia, who decreed that his property would not be used as an integrated park, and no one has any **right**, federal or otherwise, to require that the property be used in a manner contrary to the restrictions placed upon the use of the property by Bacon. And, of course, with the removal of the property from the "public" to the private sphere any possible question of state action which would violate the Fourteenth Amendment has been eliminated. It is indeed difficult to conceive how the Georgia decision, which expressly recognized that Bacon's property could not continue to be used as a segregated park, could in any way "encourage racial discrimination."

Likewise, petitioners' contention that Negroes will be discouraged "from asserting their rights" (Petitioners' brief, p. 41) is a hollow argument. This was not "public property" in the usual sense. It was trust property, the use of which was subject to conditions set forth in Bacon's will. Furthermore, as a practical matter it is most unlikely that there is a similar situation in existence anywhere else in the country. Also, petitioners should hardly be concerned that the Georgia decision would suggest similar testamentary trusts to other persons, for it is now settled that a testator, or settlor, could not validly devise or convey his property to a municipal corporation in trust with a racial

condition. Nor could a municipal corporation accept such a trust. It is apparent, we think, that petitioners are trying to raise an issue which does not exist.

Although the construction of wills is peculiarly a matter for the application of state law by state courts, petitioners urge upon this Court the contention that the Georgia court incorrectly construed Bacon's will. Looking at the will in even a cursory manner, one cannot help but be impressed by the fact that Bacon planned for his park with the greatest of care and deliberation. This park, which was to be a memorial to Bacon's two sons, was by no means to be just another "city park." Instead, Bacon's park was to be subjected to conditions not applicable to other parks; and the operation and management of the park were vested in a Board of Managers which was to (and did) function entirely independent of the City and its governing body.

As for the racial restriction, we can hardly imagine Bacon having used language which would have more clearly indicated his intent that the use of his property should be extended to white persons only, or which would have more clearly indicated that this limitation was an essential and indispensable part of his plan for Baconsfield. Indicative of Bacon's careful planning in this regard is the fact that not only was he careful to limit Baconsfield to white persons, but also he provided that the white men of Macon, and white persons from other communities, would be admitted only at the pleasure of the Board of Managers. Furthermore, he authorized the Board to "exclude at any time any person or persons of either sex, who may be deemed objectionable."

Insofar as this litigation is concerned, obviously, the most significant passage in Bacon's will is that which explains why he so carefully limited the use of Baconsfield to the "white women, white girls, white boys, and

white children of the City of Macon." The racial limitation was not included because of any feeling of hostility toward colored people, nor was it prompted by a desire to be charitable only to persons of his own race, or because Bacon felt that the presence of Negroes would "spoil" the park for white persons. Instead, it was that as a matter of personal social philosophy, Bacon was:

> ". . . without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common" (A. 21).

Petitioners have suggested several reasons why they think the Georgia court erred in its construction of Bacon's will, none of which, we submit, has any merit.

First, they argue that neither Bacon nor any other person "has any lawful power" to exclude Negroes from Baconsfield park. As has been pointed out, there is no dispute about the fact that Bacon's property cannot now be used for a park operated on a segregated basis. However, at the time Bacon's will was probated, and up until this Court's decision in 1966, there was no adjudicated constitutional prohibition against the operation of Baconsfield in a manner consistent with the requirements set forth in Bacon's will. The fact that some 50 years after the probate of Bacon's will it was decided by the United States Supreme Court that the park which Bacon created cannot continue to be operated for white persons only did not give the Georgia court, or any court, the right to rewrite Bacon's will to delete those restrictions relative to the use of the park by white persons. There is clearly a difference between a court determining that a trust cannot continue to be operated in accordance with the testator's intent because such operation would be contrary to law, and a holding that because of this, the "illegal"

words will simply be disregarded. In such a situation as existed in this case, a court would in any event have to construe the will under consideration in light of the failure of the trust, and would have to determine whether or not *cy pres* could be applied, and if it could not, then the property would revert by operation of law. In no event could the testator's intention simply be disregarded or ignored.

The second consideration advanced by petitioners relates to the fact that Bacon did not expressly provide for reverter upon failure of the trust. It is probable that Bacon never actually considered that his trust would fail, for at the time he drafted his will (and up until 1966) his plan for Baconsfield was entirely lawful. The absence of a clause providing for express reversion is of absolutely no significance whatever insofar as Georgia law is concerned. As the Georgia Supreme Court pointed out, the property did not revert under the terms of the will; it reverted because of Ga. Code Sec. 108-106 (4) which provides that upon the failure of an express trust, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs. Stated differently, when the trust failed, reversion occurred as a matter of law in the absence of a gift over.

We submit that a fair and reasonable reading of Bacon's will leads to the undeniable conclusion that under no circumstances could Bacon's property ever be used as an integrated park. While Bacon may not have specifically contemplated a trust failure, he **did** expressly state that he was "without hesitation in the opinion that in their social relations the two races should be **forever** separate and . . . they should not have pleasure or recreation grounds to be used or enjoyed together and in common." Bacon's will is certainly not "silent on this point."

Petitioners are in error when they suggest that the Georgia court should have considered what "a Georgian who died over 50 years ago" would prefer. The Georgia court was constrained to consider only what **Bacon** (and no one else) would have wanted had he known that his plan for Baconsfield would someday become impossible of accomplishment; and, in answering this question, the Georgia court could look only to Bacon's will. That is to say, the court could not speculate as to what a hypothetical Georgian might have desired; nor could it engage in speculation as to what use might be made of the property upon reversion. There is no law, state or federal, which would permit a court to "update" a testator's social philosophy. Suffice it to say, the Georgia court was bound by Bacon's intention as manifested in all of the provisions of his will. See **Yerby v. Chandler,** 194 Ga. 263, 21 S. E. 2d 636 (1942).

Petitioners are also wrong when they imply that respondents are attempting to mislead by stressing "that one action—maintenance of the park with Negroes in it—will violate Senator Bacon's will, while utterly submerging the fact that the other action—destroying the park forever—will also cardinally violate Senator Bacon's will (Petitioners' brief, p. 44). It is no doubt true that Bacon would not have wanted his trust to fail, but it did fail, and it failed not because of any "action"[6] on the part of the Georgia court, but because an essential element of the trust became impossible of accomplishment. Under the circumstances which not exist, reversion could have been avoided only if Bacon had provided for a gift over, but this he did not do. The

[6] The application of cy pres would have involved affirmative action by the court, and under generally recognized principles of trust law cy pres can never be applied where the result would be contrary to the express desire of the testator. IV **Scott, Trusts,** Section 339.1 at 2831 (2d ed. 1956).

trust having failed, the property has to go somewhere, and under Georgia law it reverts by operation of law.

In an obvious attempt to "infect" the decision of the Georgia court, petitioners suggest that the court was free to "choose" between "reversion" on the one hand, and continuation of the park on an integrated basis on the other (Petitioners' brief, p. 46). The implication is that this was a "choice" which in actuality depended upon the personal predelictions of the members of the court, rather than upon Bacon's will. This is not true. When the trust failed, reversion followed automatically, regardless of what the members of the Georgia court might have preferred (or chosen) had they been "Bacon's agents". The irrevocable "choice" was made by Bacon when he spelled out in detail that his property was to be used as a park for white persons only. And this "choice" **as expressed in the will** precluded the Georgia court, or any other court, from ever applying cy pres in the manner sought by petitioners.

Petitioners imply at page 47 of their brief that because a Georgia court recognized that the trust had failed, there has been unconstitutional state action. This is not so. The fact that a Georgia court has rendered an opinion which did not accept petitioners' contentions does not mean that the state has denied them any constitutional rights.[7] One must have a right before it can be denied, and neither petitioners nor anyone else had a right, federal or otherwise, to require Bacon's property to be used as an integrated park. Suffice it to say, persons who are members of a particular religion, race or class may not create rights merely by asserting claims in a state court and having them denied.

[7] The Fourteenth Amendment is violated only where a court has taken an action on the basis of race or some purely arbitrary classification which action has denied persons rights to which they are entitled.

Petitioners, persistently minimizing the use of funds provided by the Board of Managers from rentals, suggest that the activity of the City during the period it was trustee was relevant to the issues before the Georgia court. We disagree. The fact that during the period of years when the park was being operated by the Board of Managers in accordance with Bacon's will, workmen from the City worked at Baconsfield, or that the City had any other contact or connection with the park had no bearing on the question of whether or not there had been a trust failure, and likewise had no bearing on the question of reversion, or the applicability of the doctrine of *cy pres*. It would indeed be a radical introduction into the law of trusts for a court to hold that a trustee (or anyone else) could, in effect, alter the provisions of a testamentary charitable trust by spending money (or doing anything else) in connection with the trust property. Certainly, a trustee could never acquire title to the trust property in the absence of action on the part of the person who established the trust. This is true no matter how much money the trustee might spend on the trust property. In essence, the Georgia court was concerned solely with the question of whether or not the trust had failed and (upon recognizing that it had) whether or not *cy pres* could be applied. What might have happened between the time the trust became operative and the date of termination was of no relevance.

A case illustrative of the fact that the expenditure of funds by a municipality in connection with trust property would not prevent reversion is **Charlotte Park & Recreation Commission v. Barringer**, 252 N. C. 311, 88 S. E. 2d 114 (1955), cert. denied, 350 U. S. 983 (1956). In that case it was stated:

> "If Negroes use the Bonnie Brae Golf Course, the determinable fee . . . automatically will cease and ter-

minate by its own limitation expressed in the deed, and the estate granted automatically will revert to Barringer." 88 S. E. 2d at 123.

Also, see 39 **Am. Jur.**, Parks, Squares and Playgrounds, Sec. 21, where it is stated that where land is dedicated to a municipality as a park, it "must be preserved or the land will revert to the original proprietor." Also, cf. **Bennett v. Davis**, 201 Ga. 58, 39 S. E. 2d 3 (1946).

While we do not view the activity of the City as having any bearing on the issues which were before the Georgia court, as a matter of interest, we would point out that there is nothing at all inequitable about the fact of reversion, as during the period of time the City was trustee, a large segment of the community was entitled to use Baconsfield. The situation is not at all unlike that where a municipality leases property to be used as a park. Certainly, no one would suggest that the City could acquire any greater rights in the land than provided for in the contract with the owner.

B. **The Decision of the Georgia Court Rests Solely Upon a Construction of Bacon's Will, and in No Way Rests Upon Any Proposition, Either of Law or Fact, That the Presence of Negroes Would Affect the Enjoyment of a Park by White Persons.**

The contention that the Georgia Supreme Court based its decision upon the ground that the presence of Negroes "spoils" a park for whites is totally without merit, or justification. The Georgia court was not in the least concerned with any factual consideration of whether or not the presence of Negroes might "frustrate" the enjoyment of a park by whites, nor was the court concerned with the question of whether or not the property was large enough to accommodate both the whites and Negroes of the community. Simply stated, petitioners miss the

point when they talk solely in terms of "enjoyment". Whether or not white persons in the community might actually "enjoy" using Baconsfield in conjunction with Negroes, was **not** the question. Instead, the court's only concern was whether such use would violate Bacon's restriction that his property be used by white persons only. Clearly it would, for Bacon's concern was not that Negroes might adversely affect the enjoyment of the park by white persons, but rather it was that he was opposed to the mixing of the races in social relations. Stated differently, Bacon viewed an integrated park as being affirmatively objectionable, and regardless of the fact that many white persons might not object to using such a park, Bacon did not want his property so used.

Petitioners speak in terms of the "affirmative purpose of the trust" (Petitioners' brief, p. 51) as if to imply that the Georgia court would have been justified in disregarding the racial restriction on the ground that such restriction was "negative". The Georgia court, of course, had to construe the will as a whole and to give consideration to all of its parts, including those which qualified the use of the property. Under a proper construction of Bacon's will, Bacon had only one intent, one purpose, to-wit, to create a park . . . "for the **sole** . . . use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon . . ." His plan for a park for these persons was a comprehensive, cohesive, interlocking one which may not be divided into sections or parts, and the racial limitation was very much a fundamental part of the trust purpose.

In Bacon's mind, a park which would be used by both races was significantly different from a park which would be used only by members of one race, in that a park of the former type would be contrary to his personal social philosophy. While Bacon wanted to furnish a park for white persons in the community, his charitable intention

was obviously conditioned upon the park being used by whites only. Otherwise, his property would be put to a use which he considered wrong, to-wit, a recreation ground used jointly by members of both races.

Petitioners suggest that the Georgia court could have reached the result which they deem to be socially desirable by applying the doctrine of *cy pres. Cy pres,* however, is not applied as a matter of course in every instance of charitable trust failure. Instead, it is available only where a testator has evinced a general charitable intention, and the prescribed **mode** of accomplishing this charitable purpose has failed. Here, what has become impossible of accomplishment is not simply a "mode" of fulfilling a more general charitable purpose, but instead an essential and integral part of Bacon's plan for Baconsfield has become impossible of accomplishment.

As one court has expressed it:

> "Although (a) Court cannot apply a fund held in trust, or subject to a trust, *cy pres* unless it be held for a charitable purpose, it by no means follows that all funds held for a charitable purpose may be applied *cy pres* upon the failure of the particular purpose for which they are held. It is only when the testator evinces a general charitable intention to be carried into effect in a particular mode which cannot be followed, that the words may be construed so as to give effect to the general intention (Citations). **Absent such general charitable intention, even though the specific purpose be a charitable one, when it fails, unless there be a valid alternate disposition thereof in the will, there is a resulting trust . . .**" **First Universalist Society of Bath v. Swett,** 90 A. 2d 812 (Me. 1953). (Emphasis supplied.)

Of equal importance is the fact that cy pres can be applied "only for the purpose of carrying out what would

probably have been in accordance with the intention of the testator." IV **Scott, Trusts**, Section 339.1, at 2831 (2d ed. 1956). It can **never** be applied where the result would be contrary to the express desire of the testator. Ibid.

For a Georgia court (and surely this was a matter for the state court to decide) to have applied *cy pres* in the manner sought by petitioners, would have resulted in Bacon's property being put to a use of which he very clearly and expressly disapproved, and to apply *cy pres* in this manner would be contrary to Georgia law.

Actually, the result desired by petitioners (under any of their theories) could be obtained only by returning to our jurisprudence the rightfully rejected doctrine of the royal prerogative. This doctrine, which was a part of the early English common law, permitted the sovereign in a situation such as this to apply property for any charitable purpose he might deem appropriate. According to Scott:

> "The exercise of the prerogative power by a biased or cynical or whimsical king sometimes resulted in devoting the property of the testator to purposes of which he would never have approved, purposes which might run entirely counter to his wishes . . ." IV **Scott, Trusts**, Sec. 399.1, at 2829 (2d ed. 1956).

This doctrine is not accepted in any of the states, and certainly not in Georgia. In **Jones v. Habersham**, 107 U. S. 174, it was stated, ". . . the law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised . . ."

Scholars who wish to point out the obvious evils of the doctrine of the royal prerogative cite as a classic case of injustice, **DeCosta v. DePas**, 1 Amb. 228, 2 Swanst 487 (1754). In that case, a Jewish testator had left money in

trust to establish an assembly for reading Jewish law and instructing people in the Jewish religion. This was deemed to be illegal as promoting a religion contrary to the established religion of the state. The king thereupon diverted the trust fund so that it would be used to instruct persons in the Christian religion.

Bacon's great emphasis on his racial limitation and his express disapproval of recreational areas which would be used by members of both races together and in common show that a "desegregated" park would indeed be as contrary to his wishes as the final disposition in **DeCosta v. DePas**, supra, would have been to the testator in that case.

A case of interest because it involved a testamentary devise of property for a "playfield" for white children is **LaFond v. City of Detroit**, 357 Mich. 362, 98 N. W. 2d 530 (1959). In that case, the will in question placed far less emphasis on racial restrictions than does Bacon's. Nevertheless, the Supreme Court of Michigan held in an evenly divided opinion that the unambiguous racial limitation in the gift to the City for a playfield for white children could not be eradicated through the application of *cy pres.*

The will under consideration provided:

> "The balance of my estate after deducting the above bequests is to be given to the City of Detroit, Wayne County, Michigan, for a playfield for white children, to be known as the 'Sagendorph Field.' "

The will contained no express reverter clause, nor was there any further indication of a racial limitation other than as above quoted.

The "Field" was left as a memorial to the testatrix's husband.

The Detroit Common Council passed a resolution accepting the bequest conditional upon a judicial construc-

tion of the residuary clause which would allow the City to make the playground available to all children without regard to race, color or creed.

The heirs of the testatrix filed a bill of complaint requesting that the residuary clause be held void. The City of Detroit filed defensive pleadings alleging that the bequest was valid principally because the doctrine of *cy pres* was in effect in Michigan. The lower court found for the heirs.

In affirming that judgment by an evenly divided court the Supreme Court of Michigan stated:

> "We are considering a gift of the bulk of deceased's estate to the City and deceased's express wish must be respected and carried out irrespective of this Court's desire to aid and encourage the creation of city playgrounds for children of all races and colors. The words in the will commanding that the Will 'be carried out to the letter' cannot be forgotten or disregarded. Deceased expressed in unambiguous language that she was making a bequest for the establishment of a 'playfield for white children'."

With respect to the argument that *cy pres* should be applied the Court said:

> "There is nothing in the will nor in the record disclosing a more general purpose than the specified purpose—a playfield for white children—and there is nothing in the will or record which in the slightest way indicated deceased desired the money to be applied to any other purpose than 'a playfield for white children'."
>
> **"The cy pres doctrine is used to aid the court in carrying out the true intention of the donor and cannot be used for the purpose of eliminating the unambiguous words found in deceased's will."**

* * * * * * *

> "We agree with the trial court 'for white children' are words of command and the cy pres doctrine cannot be invoked to validate the residuary bequest." (Emphasis supplied.)

Petitioners charge that the Georgia court "necessarily decided that the racial limitation in Senator Bacon's will was of more dignity and importance than his equally or more solemn and explicit provisions for the perpetuity of this trust" (Petitioners' brief, p. 58). This is wrong. The racial limitation in the will was entitled to, and given, no more "dignity" than any other provision of Bacon's will; but it **was** entitled to consideration in its proper perspective, and this is something petitioners refuse to recognize. Giving the provisions relative to the racial restriction their common sense meaning, and construing the will as a whole, it can hardly be denied that *cy pres* could never be applied in such a manner that would result in Bacon's property being used as an integrated park. If there was any "policy decision" made by the Georgia court, it was only that the end does not justify the means, and thus cy pres was not used as an unauthorized means to rationalize a result not authorized by Bacon's will or Georgia law.

Petitioners do a serious injustice to the members of the Georgia Supreme Court when they charge that the judgment of that court "implies espousal . . . of an estimate that racial mixture is crucially undesirable" (Petitioners' brief, p. 59). There is nothing in the record which would justify anyone concluding that the members of the Georgia court shared Bacon's feelings on race. The merits (or demerits) of Bacon's philosophy were not in issue. The Georgia court had to accept what it found, and regardless of the personal opinions of the individual members of the Georgia court, the racial limitation which Bacon placed upon the use of his property could not be ignored. To rule otherwise would hardly promote—would subvert—

the long standing policy of the law, both legislative and judicial, to encourage gifts for charitable purposes, both public and private.

In summary, whether or not the presence of Negroes spoils a park for whites was not in issue. Rather, the controlling consideration was Bacon's will and, notwithstanding the fact that whites might enjoy using a park in conjunction with Negroes, it is clear that an integrated park would be directly contrary to Bacon's intentions as expressed in his will.

C. **The Racial Restrictions in Bacon's Will Could Not, Under Any Theory, or for Any Reason, Have Been Treated by the Georgia Court, or Any Other Court, as "Nullities". The Georgia Court, in Construing Bacon's Will, Had to Consider These Provisions Along With All Other Provisions of the Will.**

The arguments advanced by petitioners in Sections C and D of their brief are rather closely related in that they all call for the court to disregard, and ignore, very fundamental parts of Bacon's testamentary plan; therefore, we will consider these arguments together.

The statement in the headnote to Section C that the Georgia court had to choose between "Bacon's contradictory wishes" is inaccurate. Bacon very clearly had only one wish, one intention, one purpose, to wit: to have his property used as a park for the white persons of his community, and only for the white persons. Under a proper construction of the will, Bacon's "wish" that his property be used as a park cannot be separated from the condition that the park be used **solely** by white persons. There was nothing contradictory in the least about Bacon's plan for Baconsfield and the Georgia court did not have to "choose" between any contradictory or inconsistent passages in the will. Instead, as has been discussed, the Georgia court had before it a very simple set of facts

which presented no "choices" or options. The result which obtained was mandated by these facts.

Petitioners go to great lengths in attacking Georgia Code Section 69-504, a statute which, we submit, has no relevance whatever to the issues in this case. While we strongly disagree with petitioners' contentions and conclusions with respect to Section 69-504,[8] even if we should assume *arguendo* that Bacon could not have provided for

---

[8] We do not find Section 69-504 to be germane to the issues in this case. Furthermore, we disagree with petitioners' analysis of this statute and the effect it had upon Georgia law.

A park, of course, is properly the subject matter of a charitable trust (see, e. g., **Burbank v. Burbank,** 152 Mass. 254, 25 N. E. 427 (1890), and there is no reason to believe that a park for a substantially large segment of the community would not have been entirely valid in Georgia either prior, or subsequent, to the enactment of 69-504. According to **Restatement, Trusts,** Section 379 (1959), a charitable trust for a limited class of beneficiaries will fail only "if the persons who are to benefit are not of a sufficiently large or definite class so the community is interested in the enforcement of the trust" (Also, see 15 **Am. Jur.** 2d, Charities, Section 6). It is unlikely indeed that a Georgia court would have found that the white women and children of a community such as Macon did not constitute a large enough class. Thus, even in the absence of 69-504, Bacon could have limited his beneficence to the white women and children of the community, or, if he had desired, to the women and children of all races. That 69-504 is merely declaratory of the common law is further supported by the decision of the Georgia Supreme Court in **Evans v. Newton,** 220 Ga. 280, 138 S. E. 2d 573 (1964), where the court stated:

> "The law of Georgia does not by Code Section 69-504, nor by any other statutory provision, require that any testator shall limit his beneficence to any particular race, class, color or creed. **Such limitation, however, standing alone,** is not invalid, and this court has sustained a testamentary charity naming trustees for establishing and maintaining 'a home for indigent colored people 60 years of age or older residing in Augusta, Georgia.' **Strother v. Kennedy,** 218 Ga. 180 (127 S. E. 2d 19)." *Id.* at 285. (Emphasis supplied.)

Also see **Burbank v. Burbank,** 152 Mass. 254, 25 N. E. 427 (1890), where the Massachusetts Supreme Court stated:

> "The proposed devise of a testator of a tract of land for a park was also a public charity. Bequests to improve a

a segregated park without Section 69-504, and, also, that this statute evidenced the state's interest in racial separation, it would not, and does not, follow that because of the existence of this statute all references to the racial condition in Bacon's will are to be judicially eliminated. The statute may fall but it would not necessarily carry Bacon's will, or any part thereof, with it. If this should carry Bacon's will with it, it would do so in toto and not in part only.

If we should accept petitioners' analysis of the Georgia law (and we do not), the result would be twofold (at the most), viz: (1) The Georgia statute authorizing a testator to leave property to a municipal corporation in trust subject to a racial condition would be deemed unconstitu-

---

town, as by providing for a public garden, by improving its streets, by providing for the planting of shade trees, have been held to be of this character (Citation). A gift is a public charity when there is a benefit to be conferred on the public at large, **or some portion thereof**, or upon an indefinite class of persons. Even if its benefits are confined to specified classes, as decayed seamen, laborers, farmers, etc. of a particular town, it is well settled that it is a public charity." (Emphasis supplied.)

Incidentally, we do not share petitioners' difficulty in viewing a park as promoting "human civilization". Likewise, we reject the implication that because in Bacon's time (and also now) a person could, if so desired, establish a park by "dedicating" his property to the general public, all parks had to be created in this manner. There is nothing in Georgia law which would suggest that a park could not be created by conveying property to a trustee with the direction that the park be open to a group or class which did not include the general public. An example of such a park might be one which would be for the use of the children of a particular community, but which would not be open to adults or to children from other communities.

As for **Brown v. Gunn**, 75 Ga. 441 (1885) (Petitioners' brief, p. 65), if there is no suggestion that "dedication" could have been to the white public only, there is also no suggestion that a person who desired to have his property used as a cemetery for whites only could not have accomplished that very purpose by the use of a trust (as opposed to dedication to the general public).

tional, and (2) No park created "under the authority of this statute"[9] could continue to be operated on a racially segregated basis. In no event, however, would any provision of a will establishing for such a park simply be ignored as if it did not exist.

There is no question but that petitioners are urging a most radical departure from fundamental concepts of will construction when they talk about treating any provision of a will as being a mere "nullity" which can be disregarded as if it did not appear in the will. They are saying nothing less than that the Georgia court should have "rewritten" Bacon's will so that what they would consider to be a socially desirable result would have obtained. This is simply not the law. As has been discussed, if a charitable trust fails because an indispensable provision thereof is deemed to be unenforceable the result is not an *ipso facto* elimination of that provision from the will, but instead it then becomes the duty of the court to consider whether under the circumstances then existing *cy pres* can, or cannot, be applied.

The cases which petitioners cite as having a bearing on the effect of the alleged "taint"[10] lend no support to their argument, and, if anything, they point up the obvious weakness of petitioners' contentions.

In **Burton v. Wilmington Parking Authority**, 365 U. S. 715 (1961), it was held, in effect, that the operator of a restaurant who leased space in a state owned building (because of the relationship with the state) had to comply with the "proscriptions of the Fourteenth Amendment" (i. e., as long as he continued to operate the

---

[9] See footnote 8.

[10] In view of the issues before the court when this case was last before it, we think it fair to assume that the use of the word "taint" which petitioners refer to has reference only to the question of affirmative enforcement of the racial conditions.

restaurant he could not discriminate on the basis of race). Petitioners cite specifically Mr. Justice Stewart's concurring opinion in which he stated that the Delaware statute which authorized refusal of service to persons deemed offensive to a proprietor's other customers had been interpreted by the Delaware Supreme Court as authorizing discrimination based upon race, and therefore the statute was unconstitutional. If the statute had been declared unconstitutional then the effect of such a ruling would have been that henceforth restaurant owners could not have acted pursuant to the statute. The only possible significance the **Wilmington Parking Authority** case could have on the Baconsfield case would be with respect to the question of whether or not the park could continue to be operated on a segregated basis, a matter which is now no longer in issue. There is nothing in **Burton v. Wilmington Parking Authority**, supra, either in the majority opinion or in Mr. Justice Stewart's concurring opinion, which would remotely suggest that the restaurant had to continue to be operated if the lessee did not want to operate it on a racially non-discriminatory basis. Likewise, there is no federal requirement that Baconsfield continue as a park in violation of Bacon's will.

In **Peterson v. City of Greenville**, 373 U. S. 244 (1963), the manager of the local S. H. Kress store asked certain Negroes to leave the white lunch counter because they were violating a state law which required[11] that restaurants be segregated. When the Negroes refused to leave they were arrested and subsequently convicted for violating the state's trespass statute. The U. S. Supreme Court reversed the convictions on the ground that they had the effect of enforcing municipally required segregation and thus there was involved state action violative of the Fourteenth Amendment. The practical effect of the

[11] Sec. 69-504 did not require that a testator restrict the use of a park to members of one race or the other.

Peterson decision was that, at least in Greenville, the owner of a restaurant could not continue to operate a restaurant on a segregated basis (unless, perhaps, he could have done so by resorting to self-help). But, as in **Wilmington**, this certainly did not mean that S. H. Kress Company or any other restaurant owner was under an affirmative duty to continue to operate a restaurant.

Rietman v. Mulkey, 387 U. S. 369 (1967), is cited as having a bearing on petitioners' argument that the state suggested and encouraged segregation. Petitioners create a credibility chasm when they infer that Section 69-504 might have had something to do with Bacon restricting the use of Baconsfield to white persons.[12] Certainly, anyone who has even scanned the will with the slightest degree of objectivity could not seriously suggest that Section 69-504 was in the slightest way responsible for Bacon's strong conviction that the park be operated on a segregated basis. This is particularly true since Bacon actually explained why he was imposing the racial limitation. And to suggest that Bacon, the "careful lawyer", might have been concerned about a court misconstruing the word "may" is to defy common sense. The statute is not confusing or bewildering in the least. Furthermore,

---

[12] Further evidence of the fact that 69-504 had no effect whatever on Bacon's plan for Baconsfield can be found in Item 10th of the will where he provided that if it were held that the City of Macon did not have the legal power under its charter to hold the property in trust "for the purposes so specified", appropriate legislation was to be obtained to confer that power upon the City. Ga. Code, Sections 69-504 and 60-505, of course, expressly recognized the power of any municipality in Georgia to serve as trustee for such purposes. It is reasonable to assume then, that Bacon did not know of these two sections when he drafted the passages of his will providing for Baconsfield Park, and it is reasonable to conclude that these passages were lifted from an earlier draft of his will completed before the enactment of 69-504 and 69-505. Thus, any similarity between the wording of his will and that of the statute probably demonstrates that the statutes were patterned to fit his will rather than the other way around.

the weakness of petitioners' argument becomes even more apparent when we realize that neither the State of Georgia nor the City of Macon at any time required segregation in its parks.

The implication that Bacon might have wanted to open his park to women and children of both races is, of course, totally without foundation, particularly in view of Bacon's strong feelings about the use of playgrounds by the two races "together and in common."

We submit that if Section 69-504 falls because it is unconstitutional, it does not carry with it an individual's will which provided for a related testamentary disposition (or even one which was "dependent" upon the statute). The will still remains and all of its provisions must be considered in arriving at a proper construction. As we see it, Section 69-504 would have a bearing on the issues present in this case only if it had actually affected Bacon's intentions as expressed in the will. For example, if Bacon had stated in his will that he wanted a park for all of Macon's citizens but he felt Section 69-504 prohibited this then, of course, the Georgia court would have taken this into consideration. But, it is abundantly clear that Section 69-504 was not in the remotest way responsible for Bacon's racial condition and Bacon cannot be penalized, or have his property appropriated to a use of which he disapproved, simply because the State in which he resided happened to have a statute which authorized him to do what he did (and what he could have done even if there had never been any such statute).

Petitioners continue their Section 69-504 argument in Section D where they contend that Bacon's will "rested" upon Georgia Code, Section 69-504, and since this statute has always been unconstitutional (so petitioners erroneously contend) those provisions of Bacon's will which provide for the racial restriction should simply be stricken.

Assuming *arguendo* that 69-504 was in fact unconstitu tional, its provisions could be (to use petitioners' word "stricken" **only** because the statute was promulgated b the state legislature, and the 14th Amendment forbi State sponsored racial discrimination. Bacon's will, course, was solely the product of Bacon, a private citize and no matter how discriminatory the provisions of h will might be, they cannot be treated in the same manne as a state statute, for the 14th Amendment does not reac private discrimination. While Bacon's plan can no longe be carried out, there is no law, state or federal, whic would authorize any court to "strike out" any part of th will, leaving those portions pleasing to petitioners t stand.

The Georgia Supreme Court considered the contentio that Georgia Code, Section 69-504 was unconstitutiona even at the time it was enacted, and correctly conclude that for it to "hold that the trust provision of Senato Bacon's will was made pursuant to an unconstitutiona Code Section, would have the effect of making the trus impossible of performance (**Smith v. DuBose**, 78 Georgi 413, 434), and thus cause a reversion under Code Sectio 108-106 (4)" (Opinion of Georgia Supreme Court, A. 542)

We agree with the Georgia Supreme Court that whethe or not Section 69-504 was, or was not, constitutional a the time of its enactment has no bearing on the issues i this case for the same result obtains in either event Nevertheless, we would note in passing, and in defense o Section 69-504, that this statute was in fact constitutiona "even under **Plessy v. Ferguson.**"[13] Section 69-504 ha

[13] Also see **Evans v. Newton**, 382 U. S. 296, 86 S. Ct. 48 where Mr. Justice Harlan stated in a dissenting opinion:

> "(I)t could hardly be argued that the statute in questio was unconstitutional when passed, in light of the then-pre vailing constitutional doctrine; that being so, it is difficul to perceive how it can now be taken to have tainted Sena tor Bacon's will at the time he made his irrevocable choice. 86 S. Ct. at 497.

absolutely nothing whatever to do with a park system established by a city. Even if it did, whether or not a system provided for "separate but equal" parks would obviously depend upon an examination of the particular park system under consideration. Furthermore, neither the State of Georgia nor the City of Macon has ever had a statute or ordinance requiring racial segregation in parks; therefore, the "separate but equal" doctrine could hardly be in issue.

It also should be noted that while Section 69-504 authorized a testator to provide for a park that would be racially segregated, it did not require that such a park necessarily be segregated **(Evans v. Newton**, 220 Ga. 280, 138 S. E. 2d 573 (1964)).

Petitioners proffer several other theories which they think would authorize the court to treat portions of Bacon's will as "nullities". They begin Section D by suggesting that one reason Bacon's will should be accorded such unusual treatment is because the provisions of his will relative to Baconsfield Park "became tantamount to City ordinances." (Petitioners' brief, p. 50.) Petitioners cite no authority in support of this unusual proposition, and, of course, there is none. A will does not lose its identity or status as a will simply because a municipality is named as the trustee of a testamentary trust.

Ordinances are commonly understood to be enactments of the legislative body of a municipal corporation. If a court accepted the proposition that the provisions of a will could somehow be considered to become city ordinances, then it would logically follow that the governing body of the city would have the power to alter the provisions of the will in the same manner they could amend "other city ordinances." We can hardly imagine a more fundamental (or more unacceptable) departure from the law of wills.

The "factual" reasons which petitioners cite in support of their argument that Bacon's will should be treated as a city ordinance are equally without merit. There is certainly no basis for the statement that the provisions of Bacon's will were "promulgated and espoused by the City with respect to the conduct of this public park." (Petitioners' brief, p. 71.) It was Bacon, and not the City of Macon, who promulgated these provisions. Furthermore, the management of the park was vested, not in the City, but in a Board of Managers whose sole responsibility was the operation of the park in accordance with Bacon's will.

The contention that Bacon actually intended for the provisions of his will to "speedily gain" the status of city ordinances (Petitioners' brief, p. 72) is not only without foundation, it is pure fantasy. There is not the slightest indication in the will that Bacon had any such intention. Furthermore, had Bacon intended to involve the City to such an extent (and under Georgia law, we know of no way for him to have elevated his will to the status of a city ordinance) it hardly seems likely that he would have provided for the park to be managed by a Board of Managers rather than by the City.

The "philosophy" of **Marsh v. Alabama**, 326 U. S. 501 (1946), has no application to the case under consideration, for the situation in the present case differs markedly from that which existed in **Marsh**, supra. The fundamental difference (and the only one necessary to comment upon) is that, with the failure of the trust, Bacon's property has been completely removed from the "public sphere"; and, therefore, there can be no question of anyone being denied any constitutional rights.

While **Marsh v. Alabama**, supra, might have been of possible relevance to the question of whether Bacon's property could continue to be used as a segregated park,

it is of no significance whatever insofar as the state law question of trust failure is concerned.

Certainly, the Supreme Court in **Marsh**, supra, did not suggest that the Gulf Shipbuilding Company was under any sort of affirmative obligation to continue to use the property which it owned as a "company town". On the contrary, if the company had felt strongly about the matter they could have removed their property from the "public sphere" by devoting it to a different use. The Supreme Court was concerned solely with the operation and regulation of the town, and not with any duty of the company to actually continue to use the property as a town so as to enable persons to exercise their constitutional right to distribute leaflets to persons who reside in such towns.

Nor can petitioners find support in either **Commonwealth of Pennsylvania v. Brown**, 392 F. 2d 120 (3rd Cir. 1968), cert. denied 391 U. S. 921 (1968) or **Sweet Briar Institute v. Button**, 280 F. Supp. 312 (W. D. Va. 1967) rev'd per curiam, 387 U. S. 423, decision on the merits, 280 F. Supp. 312 (1967), for in neither of these cases was trust failure (and reversion) in issue. The decision of the Georgia court is completely consistent with these decisions, for it was expressly recognized that the racial restriction could not be enforced.

We do not share petitioners' surprise that the Georgia Supreme Court did not deem it necessary to discuss petitioners' contentions with respect to dedication. That there had been no dedication to the general public was so obvious as not to require elaboration. The very words of the will clearly negate any intention on Bacon's part to "dedicate" his property to the use of the general public. On the contrary, Bacon was most specific in limiting the use of his property to a particular segment of the community. And when one devises property in trust to be used only for a certain specific purpose, and only by a

specific segment of the community then no one, be it the trustee or a court, has any right to put the property to any use except as would be consistent with the terms of the will. As was stated in **Brown v. City of East Point**, 148 Ga. 85, 95 S. E. 962 (1918):

> "Where the dedication, express or implied, is made for a specific purpose, the public authorities have no power to use the property for any purpose other than the one designated (Citation). Property dedicated to a particular purpose cannot be the dedicatee, a municipality, be diverted from the purpose except under the right of eminent domain."

And if the use to which land is "dedicated" or conveyed in trust is not preserved, or fulfilled, then "the land will revert to the original proprietors." 39 **Am. Jur.**, Parks, Squares and Playgrounds, Section 21.[14]

Dedication is by definition a matter of property law, and whether or not a tract of Georgia property has been dedicated to the general public is very fundamentally a consideration controlled by Georgia law. The federal law command, as expressed in this court's decision in **Evans v. Newton**, 382 U. S. 296 (1966), is only that if Bacon's property were to be continued to be used for a park, it would have to open to members of both races. This, we submit, has nothing whatever to do with the state law question of whether or not, **when Bacon executed his will**, he "dedicated" his property to the use of the general public.[15]

---

[14] Also see 23 **Am. Jur.** 2d, Dedication, Section 68:

> "Where property dedicated to the public is abandoned or relinquished, the public's rights in the property are terminated and, by operation of law, it reverts to the original dedicator or to his heirs or grantees, at least when a mere easement was created by the dedication, or when, under an applicable statute, the dedication vested a fee in trust for public use."

[15] There was, of course, no federal requirement that Bacon dedicate his property to the general public.

Dedication results from an act on the part of the property owner and whether or not property has been "dedicated", and the extent of any such dedication, is answered by examining the act of the dedicator (in this case, Bacon's will). If the will did not result in the property being dedicated to the public at large, and obviously it did not, then there was no dedication to the general public, and something which happened many years later cannot alter this fact.

In summary, under no theory advanced by petitioners (or under any other theory) could any provision of Bacon's will have been treated as a nullity, for it was the obligation of the Georgia Court to construe the will as a whole, and to consider all parts and provisions thereof, including those provisions which limited the use of the property.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Georgia Supreme Court should be affrmed.

Respectfully submitted,

FRANK C. JONES,

TIMOTHY K. ADAMS,

CHARLES M. CORK,
500 First National Bank Building,
Macon, Georgia 31201,
Attorneys for Respondents.